



No. 97-1992

Supreme Court, U. S.

FILED

JUL 27 1998

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In The  
**Supreme Court of the United States**

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October Term, 1997

VAUGHN MURPHY,

*Petitioner,*

vs.

UNITED PARCEL SERVICE, INC.

*Respondent.*

*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit*

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

1. The Americans with Disabilities Act ("ADA") defines "disability" under 42 U.S.C. § 12102(2)(A) as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual." Petitioner is an employee with the physical impairment of high blood pressure that, due to successful treatment with medication, does not substantially limit any major life activity.

The first question presented by Petitioner is whether, as the Court of Appeals held, the definition of "disability" under the ADA requires an assessment of whether Petitioner's actual limitations caused by his impairment as controlled by medication are sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity; or, as Petitioner argues, the ADA requires an assessment of what hypothetical limitations the Petitioner (and the tens of millions of other Americans with impairments controlled by medication or assistive devices such as eyeglasses) would suffer without medication and whether those hypothetical limitations would be sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity.

**Respondent UPS agrees with Petitioner that certiorari is appropriate on this question.** There currently is a significant split of authority in the circuits, which places a national employer such as UPS in the position of attempting to comply with different legal standards depending on geographic location. The problem is illustrated by the opposite holdings on the issue rendered by the Tenth Circuit in this case and the First Circuit in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1<sup>st</sup> Cir. 1998).

2. Petitioner's second question should be disregarded because it was not addressed by the Court of Appeals; however, the appropriate question would be whether the District Court properly granted summary judgment based on the alternative ground that Respondent's compliance with Department of Transportation ("DOT") safety regulations regarding high blood pressure is a complete defense to this ADA claim?

3. Petitioner's third question should be disregarded because it was not addressed by the Court of Appeals; however, the appropriate question would be whether the District Court properly granted summary judgment based on the alternative ground that, if one assumed Petitioner had an ADA disability, he was not a "qualified individual with a disability" because he could not satisfy DOT blood pressure regulations and there was no reasonable accommodation that would allow him to perform his job?

4. Petitioner's fourth question raises only the issue of whether the evidence posed a material fact dispute; however, the appropriate question would be whether the District Court properly granted summary judgment based on the ground that Respondent discharged Petitioner because his high blood pressure precluded certification under DOT regulations, not because he was regarded as having a disability.

#### **STATEMENT PURSUANT TO RULE 29.6**

Respondent is United Parcel Service, Inc. Respondent's parent corporation is United Parcel Service of America, Inc. Respondent has no nonwholly owned subsidiaries.



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## STATEMENT OF THE CASE

In August 1994, Petitioner was hired by Respondent United Parcel Service ("Respondent" or "UPS") as a mechanic at a facility in Topeka, Kansas. In compliance with U.S. Department of Transportation ("DOT") regulations, and because UPS mechanics drive commercial motor vehicles, UPS requires all mechanics to take a DOT physical and secure a valid DOT health card prior to starting work.

DOT regulations and medical regulatory criteria require that an individual must maintain blood pressure less than or equal to 160/90 in order to be physically qualified to drive a commercial motor vehicle (other than a temporary three-month certification for evaluation and treatment of mild hypertension, which is defined as from 161/91 to 180/104). The parties in the case stipulated that Petitioner's blood pressure at all relevant times was above the 160/90 standard established by the DOT.

On August 16, 1994, when Petitioner took his DOT physical, his blood pressure was 186/124, far above the DOT standard of 160/90. The testing clinic erroneously issued Petitioner a DOT health card. In his STATEMENT OF THE CASE, Petitioner inaccurately states that "He passed the [DOT] test." Petitioner actually failed the DOT test with his blood pressure of 186/124.

Petitioner commenced work based on the erroneous DOT health card. On September 15, 1994, while reviewing medical records, the Medical Services Supervisor for Respondent discovered that Petitioner's blood pressure was above the DOT standard and that his DOT health card had been issued in error. On September 26, 1994, Petitioner's blood pressure was retested twice and his blood pressure readings were 160/102 and 164/104, still above the DOT standard of 160/90. Petitioner



was terminated on or about October 5, 1994, because of his inability to meet DOT requirements.

While Petitioner cannot meet DOT blood pressure requirements, with the help of medication, he suffers virtually no limitations resulting from his hypertension. He has worked in the physically demanding job of mechanic (in positions that did not require DOT certification) for more than 22 years without experiencing any difficulties due to his hypertension. No doctor has ever placed any limitation on Petitioner because of his hypertension. Petitioner's treating physician testified that Petitioner "functions normally doing everyday activity that an everyday person does."

Petitioner alleges that Respondent discriminated against him on the basis of his alleged disability, hypertension, when it terminated his employment as a mechanic due to his failure to satisfy the DOT blood pressure requirements. Petitioner contends that Respondent should have allowed him to continue driving commercial motor vehicles even though he was not certifiable under DOT regulations.

The District Court granted Respondent's Motion for Summary Judgment on October 22, 1996, on the following grounds: (1) Petitioner failed to establish a genuine issue of material fact on the question of whether his high blood pressure/hypertension constitutes a "disability" under the ADA; (2) Petitioner failed to establish a genuine issue of material fact on the question of whether, even if he did not have an actual disability under the ADA, he was "regarded as" having a "disability" under the ADA; (3) Petitioner failed to establish a genuine issue of material fact on the question of whether, assuming he had a "disability" under the ADA, he was a "qualified individual with a disability" under the ADA; (4) Petitioner failed to establish a genuine issue of material fact

on the question of whether there was a reasonable accommodation that would have enabled him to perform the essential functions of the job he held with Respondent; and (5) Respondent's compliance with DOT safety regulations' physical standards for persons driving commercial vehicles is a complete defense to Petitioner's ADA claim. Petitioner appealed the District Court's decision to the Tenth Circuit Court of Appeals on November 20, 1996. On March 11, 1998, the Tenth Circuit affirmed the District Court's decision on grounds 1 and 2 and declined to consider the other grounds as moot.

## ARGUMENT

### I.

**RESPONDENT UPS AGREES THAT CERTIORARI IS APPROPRIATE WITH RESPECT TO THE FIRST QUESTION RAISED BY PETITIONER REGARDING WHETHER THE ADA DEFINITION OF DISABILITY REQUIRES THE ASSESSMENT OF AN IMPAIRMENT IN A MEDICATED STATE OR IN A HYPOTHETICAL UNMEDICATED STATE.**

Respondent UPS agrees with Petitioner that certiorari is appropriate on the first question presented by Petitioner, but not on any other questions. The proper description of the first question is whether, as the Court of Appeals held, the definition of "disability" under the ADA requires an assessment of whether Petitioner's actual limitations caused by his impairment as controlled by medication are sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity; or, as Petitioner argues, the ADA requires an assessment of what hypothetical limitations the Petitioner (and the tens of millions of other Americans with impairments controlled by medication or assistive devices such as eyeglasses)

would suffer without medication and whether those hypothetical limitations would be sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity.

There currently is a significant split of authority in the circuits on this question, which places a national employer such as UPS in the position of attempting to comply with different legal standards depending on geographic location. The problem is illustrated by the opposite holdings rendered in two UPS cases — the Tenth Circuit in this case and the First Circuit in *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1<sup>st</sup> Cir. 1998).

Six Courts of Appeals' decisions have discussed and decided the issue, with four in favor of Petitioner and two in favor of Respondent. Three other circuits have cited EEOC interpretative guidance that favors Petitioner's position, without discussion of the underlying issue. Respondent submits that this Court should grant certiorari on the "medicated" issue and provide uniform application of the ADA across the country.

The Tenth and Sixth Circuits have held, consistent with the Respondent's position in this case, that the ADA statutory definition requires an assessment of limitations after medication or assistive devices. *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 902 (10<sup>th</sup> Cir. 1997) ("In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures."); *Gilday v. Mecosta County*, 124 F.3d 760, 767 (6<sup>th</sup> Cir. 1997) (Judge Kennedy wrote in his concurring opinion:<sup>1</sup> "The ADA does

1. Two of the three judges on the panel concluded in concurring opinions that the existence of a disability should be determined after medication, while the opinion in the case was written by the single judge on the panel who concluded that disability should be determined on an unmedicated basis.

not provide protection for anyone with any degree of physical or mental impairment: It provides protection only for those whose impairments substantially limit their lives. I do not believe that Congress intended the ADA to protect as 'disabled' all individuals whose life activities would hypothetically be substantially limited were they to stop taking medication.") The Fifth Circuit also expressed agreement, albeit in dicta. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-92, n.3 (5<sup>th</sup> Cir. 1996) ("... had Congress intended that substantial limitation be determined without regard to mitigating measures [such as medication], it would have provided for coverage under § 12101(2)(A) for impairments that have the potential to substantially limit a major life activity."). See also *Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 ("... EEOC Interpretative Guideline ... is in direct conflict with the ADA's express statutory language ..."); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994) (EEOC's "interpretive gloss" is "at odds with clear statutory language"); *Ferguson v. Western Carolina Regional Sewer Authority*, 914 F. Supp. 1297, 1299 (D.S.C.), *aff'd*, 104 F.3d 358 (4<sup>th</sup> Cir. 1996) ("[T]he determination of whether an individual has a disability should be based not on the diagnosis of the impairment, but on the effect of the impairment on the life of the individual." citing 29 C.F.R. 1630.2(j)).

Four circuits have discussed the issue and ruled in favor of the position advocated by Petitioner. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854 (1<sup>st</sup> Cir. 1998); *Matczak v. Frankford Candy and Chocolate Company*, 136 F.3d 933 (3<sup>rd</sup> Cir. 1997); *Baert v. Euclid Beverage, Limited*, 1998 U.S. App. LEXIS 15293 (7<sup>th</sup> Cir.), and *Harris v. H & W Contracting Co.*, 102 F.3d 516 (11<sup>th</sup> Cir. 1996). Three other circuits, which Petitioner characterizes as having "upheld" the EEOC position, simply cited EEOC interpretative guidance that favors Petitioner's position, without discussion of the underlying issue. *Foreman*



*v. Babcock & Wilcox Co.*, 117 F.3d 800 (5<sup>th</sup> Cir. 1997), *cert. denied*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 1050, 140 L. Ed. 2d 113; *Doane v. City of Omaha*, 115 F.3d 624 (8<sup>th</sup> Cir. 1997), *cert. denied*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 693, 139 L. Ed. 2d 638; and *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9<sup>th</sup> Cir. 1996), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 1349, 137 L. Ed. 2d 506.

In view of this significant split of authority in the circuits, the question of whether the ADA requires an analysis of conditions in their medicated or unmedicated state is a clear question of statutory construction that needs to be resolved by this Court.

## II.

**THE TENTH CIRCUIT CORRECTLY HELD THAT RESPONDENT'S HIGH BLOOD PRESSURE MUST BE VIEWED IN ITS MEDICATED STATE AS OPPOSED TO A HYPOTHETICAL UNMEDICATED STATE TO DETERMINE WHETHER HE HAS A DISABILITY UNDER THE ADA.**

Petitioner's high blood pressure is controlled by medication. He has worked successfully for 22 years as a mechanic for other employers in jobs that did not require the driving of commercial motor vehicles and DOT certification. He lives a normal life with virtually no restrictions.

The Tenth Circuit in this case correctly held that the ADA definition of disability required an assessment of whether Petitioner's actual limitations caused by hypertension, as controlled by medication, were sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity. The court properly rejected Petitioner's argument that the ADA requires speculation about what hypothetical

limitations he would suffer without medication and whether those hypothetical limitations would be sufficient to meet the statutory requirement of an "impairment that substantially limits" a major life activity.

Petitioner's argument is contrary to clear statutory language requiring an "impairment that substantially limits one or more major life activities," not an impairment that potentially or hypothetically limits a major life activity. The extraordinarily broad view of "disability" advocated by Petitioner was illustrated at oral argument in this case at the Court of Appeals. Petitioner and Amici EEOC argued that every person who needs eye glasses has a disability under the ADA.

In *Bragdon v. Abbott*, 1998 U.S. LEXIS 4212, where this Court held that HIV was a disability under the ADA, inherent in the Court's holding was that the statute requires an actual limitation of a major life activity, not a hypothetical limitation which may be suffered. The Court stated, "[t]he [ADA] is not operative, and the definition [of a disability] not satisfied, unless the impairment affects a major life activity." *Id.* at \*23-\*24.

Consistent with *Bragdon*, the Tenth Circuit in this case held that the ADA definition of disability was not satisfied because, with Petitioner's high blood pressure controlled by medication, the condition did not substantially limit a major life activity. This holding is mandated by the clear language of the ADA definition of disability.

Section 12102(2)(A) defines "disability" as "a physical or mental impairment that *substantially limits* one or more of the major life activities of such individual." (*emphasis added*) It does not define disability as an impairment that "potentially" limits a major life activity or an impairment that would, absent medication, limit a major life activity. Petitioner seeks to have

this Court make such a change in the statutory language. Such a re-writing of the ADA would require, in this case and thousands of other cases, that trial courts and juries engage in speculation about what limitations would hypothetically exist in the absence of medication or assistive devices, and determine whether those hypothetical limitations meet the statutory requirement that the "impairment substantially limit one or more major life activities."

Such an excursion into the hypothetical world is contrary to statutory language of Section 12102(2)(A). It also is unnecessary to protect persons such as Petitioner with an impairment that does not limit a major life activity, but who might still be subject to discrimination based on stereotypical myths regarding the impairment.

Congress already has provided that protection in a separate section of the ADA definition of disability that covers persons "regarded as" having a disability. See 42 U.S.C. § 12102(2)(C). The "regarded as" provision of the ADA is designed to "combat the effects of 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) This protection under the "regarded as" provision would apply to such discrimination against Petitioner because of his hypertension and against other persons with a broad range of impairments that do not substantially limit a major life activity. In this case, as properly held by the Tenth Circuit, Petitioner did not fall within the "regarded as" provision because UPS' action was based on clear DOT regulatory requirements, not any archaic attitudes, myths or erroneous perception about hypertension.<sup>2</sup>

2. The Petition for Certiorari does not challenge the Tenth Circuit's legal analysis on this issue; it only raises the question of whether there was a genuine issue of material fact on the issue. (Question 4).

Because the "regarded as" provision of Section 12102(2)(C) protects employees with impairments that do not substantially limit a major life activity, but who still might be discriminated against because of their impairment, there is no need to misinterpret the language of Section 12102(2)(A) requiring an "impairment that substantially limits one or more major life activities."

Such a misinterpretation of Section 12102(2)(A) would result in literally millions of Americans having an ADA disability, even though they suffer no limitation of a major life activity. For example, it is estimated that approximately 50 million Americans (20% of the country's population) suffer from hypertension. (Source: The American Heart Association) Under Petitioner's argument, these 50 million Americans would each have a "disability" under the ADA. This would just be the tip of the iceberg of statutory expansion because there are many other similar health conditions that are often effectively controlled by medication — asthma, allergies, depression, ulcers, vision impairments, arthritis, and diabetes. The definition of "disability," according to Petitioner, would extend to millions of Americans with a variety of illnesses or injuries who, with the aid of medication or other corrective measures, lead active, healthy, and unrestricted lives.

There is no statutory basis, or need, for Petitioner's proposed expansion of the definition of "disability." If a health condition is not controlled by medication and it actually substantially limits a major life activity, the individual should be protected against discrimination and is protected because his condition falls within the definition of "disability" under § 12102(2)(A). If an individual's health condition is controlled by medication, but an employer still "regards" the employee as having a disability based on stereotype, myth or bias, the employee should be protected against discrimination and is protected under the



"regarded as" disabled provision of § 12102(2)(C). The purpose of the ADA is to protect individuals who suffer real limitations or who are victims of biased perceptions of limitation, not to promote federal court litigation by extending coverage to every individual with a health condition that could hypothetically limit a major life activity.

A thorough discussion of how the EEOC interpretive guidance (and Petitioner's argument in this case) is in direct conflict with the statutory language of the ADA is set forth in *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996):

[T]he crucial determination becomes whether the EEOC guidance is correct that the disability inquiry should be made without regard to the ameliorative effects of medication. The EEOC's guidance is not binding on the court. *See, e.g. Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 812 (N.D. Tex. 1994) (EEOC guidance not a binding regulation but simply a statement of what the agency thinks the statute means). Recognizing this, plaintiff notes that the Court of Appeals for the Seventh Circuit has cited the EEOC's guidelines with approval in *Roth*, 57 F.3d at 1454. Plaintiff also cites several decisions in which courts have applied the EEOC guidelines and concluded that an insulin-dependent diabetic is disabled under the act. *Pater v. Deringer Manufacturing Co.*, 1995 WL 530655 at \*4, 4 AD Cases 1840 (N.D. Ill. Sept. 7, 1995) (diabetic disabled because without medication diabetes is life-limiting; *Sarsycki v. United Parcel Service*, 862 F. Supp. 336, 340 (W.D. Okla. 1994) (without insulin plaintiff would be unable to perform major life functions).

Although agency interpretations are to be given deference, *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), in this instance the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment "substantially limits" their lives. 42 U.S.C. § 12102(2)(A). *See Public Employees Retirement System v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863-64, 106 L. Ed. 2d 134 (1989) ("[O]f course no deference is due to agency interpretations at odds with the plain language of the statute itself.") If an insulin-dependent diabetic can control her condition with the use of insulin or a near-sighted person can correct her vision with eyeglasses or contact lenses, she cannot argue that her life is substantially limited by her condition. To say that a person who needs insulin or eyeglasses is disabled in fact is to read out of the act's first definition of disability the requirement that it applies only to those persons who are "substantially limited" in major life activities.

### III.

#### **CERTIORARI SHOULD NOT BE GRANTED BASED UPON PETITIONER'S ARGUMENTS REGARDING ISSUES NOT ADDRESSED BY THE COURT OF APPEALS.**

Petitioner raises two issues that were not addressed by the Court of Appeals — whether UPS' compliance with DOT regulations is a complete defense and whether Petitioner is a qualified individual for the mechanic position at issue. The general rule of this Court is that it "do[es] not address arguments



that were not the basis for the decision below." *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 369, n.5, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996). Also see *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed . . ."); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). There is no reason for the Court to depart from this general rule in this case if certiorari is granted.

However, under any circumstances, certiorari should not be granted on the DOT issue because the District Court correctly held that compliance with DOT regulations is a complete defense to Petitioner's lawsuit. See *Campbell v. Federal Express Corporation*, 918 F. Supp. 912, 917 (D. Md. 1996). When the federal government imposes requirements on an employer through DOT safety regulations and the employer complies with those regulations, it should not be subject to ADA litigation by an employee dissatisfied with the result of the compliance with DOT regulations.

Certiorari also would not be appropriate under any circumstances on the other issue raised by Petitioner, but not addressed by the Tenth Circuit --- whether Petitioner was a "qualified individual" under the ADA. The ADA defines a "qualified individual with a disability" as:

[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8). Driving a commercial motor vehicle is an essential function of a UPS mechanic's position. Because Petitioner cannot satisfy the DOT safety standard on blood pressure, he is unable to perform the essential function for a UPS mechanic of driving a commercial motor vehicle. The parties stipulated that at all material times Petitioner's blood pressure was above the DOT safety standard. Additionally, there was no reasonable accommodation available that would permit Petitioner to perform the essential function of driving a commercial motor vehicle.

#### IV.

**CERTIORARI SHOULD NOT BE GRANTED BASED ON PETITIONER'S ARGUMENT THAT THERE WAS A MATERIAL FACT DISPUTE ON THE QUESTION OF WHETHER RESPONDENT DISCHARGED PETITIONER BECAUSE HIS HIGH BLOOD PRESSURE PRECLUDED DOT CERTIFICATION OR BECAUSE HE WAS REGARDED AS DISABLED.**

The final issue raised by Petitioner was addressed by the Court of Appeals, but presents no basis for certiorari because it is merely an evidentiary dispute over the existence of disputed material fact. The question is whether the District Court properly granted summary judgment based on the ground that Respondent discharged Petitioner because his high blood pressure precluded certification under DOT regulations, not because he was regarded as having a disability. The Tenth Circuit correctly affirmed the District Court and certiorari is not warranted on that holding.

**CONCLUSION**

The District Court and the Tenth Circuit Court of Appeals correctly decided this case. However, because of the significant split in the Circuits and the national implications of the "medicated versus unmedicated" issue, this Court should grant certiorari to resolve this conflict. The Petition for a Writ of Certiorari on all other issues should be denied.

Respectfully submitted,

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